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TRANSMITTAL FORM

(to be used for all correspondence after initial filing)

Total Number of Pages in This Submission

44

Application Number

10/707148

Filing Date

11-24-2003

First Named Inventor

CHABOT

Art Unit

3761

Examiner Name

GARCIA

Attorney Docket Number

6536-0301

ENCLOSURES

(Check all that apply)

☐

Fee Transmittal Form

☐

Fee Attached

☐

Amendment/Reply

☐

After Final

☐

Affidavits/declaration(s)

☐

Extension of Time Request

☐

Express Abandonment Request

☐

Information Disclosure Statement

☐

Certified Copy of Priority Document(s)

☐

Reply to Missing Parts/
Incomplete Application

☐

Reply to Missing Parts
under 37 CFR 1.52 or 1.53

☐

Drawing(s)

☐

Licensing-related Papers

☐

Petition

☐

Petition to Convert to a
Provisional Application

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Power of Attorney, Revocation

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Change of Correspondence Address

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Appeal Communication to Board
of Appeals and Interferences

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Appeal Communication to TC
(Appeal Notice, Brief, Reply Brief)

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Proprietary Information

☐

Status Letter

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Other Enclosure(s) (please identify
below):

Remarks

Applicant's response to Notification of Non-Compliant Appeal Brief (37 CFR 41.37) and Amended Appeal Brief.

SIGNATURE OF APPLICANT, ATTORNEY, OR AGENT

Firm Name

Chabot & Associates

Signature

Printed name

Ralph D. Chabot

Date

11-29-2005

Reg. No.

39,133

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

In re Application of: Chabot

Serial No: 10/707148

Filed: November 24, 2003

Art Unit: 3679

Examiner: Ernesto Garcia

For: Method for Limiting the Movement of an Infant in a Particular Direction

Applicant's Response to Notification of Non-Compliant Appeal Brief mailed 11/21/2005

This letter serves to address particular issues raised with respect to the non-compliance notification mailed 11/21/2005. Also, an Amended Appeal Brief is enclosed.

The Examiner states that "drawings" are not permitted to be included in the "Summary of claimed subject matter" section and that the claimed subject matter fails to refer to the subject matter by line number.

37 CFR 41.37 does not preclude the use of drawings within the appeal brief. A phone call to an Administrator in the Appeals Division, Mr. Dale Shaw (ext. 9797) and then a subsequent call to SPE Daniel Stodola reflected that both had no objection to inclusion of figures within the appeal brief.

With respect to referencing by line number, Applicant is aware that 37 CFR 41.37 requires subject matter identified by line number. However, it was pointed out to both Mr. Shaw and Mr. Stodola that the pending application was filed electronically and that paragraph numbers are used as identifiers.

Both Mr. Shaw and Mr. Stodola agreed it would be acceptable if Applicant were to include designations by paragraph/line number rather than page/line number.

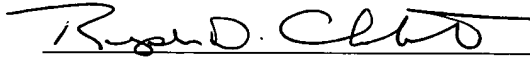
Applicant has also revised the "Summary of claimed subject matter" section. Applicant had believed that a brief description of the overall invention would be of value to the Board in addressing the outstanding issues on appeal. However, this description has been removed in

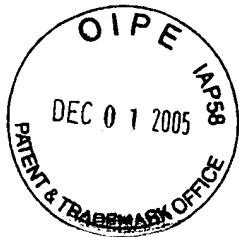
view of the Examiner's insistence that a summary of the disclosed invention is not permitted in an appeal brief.

Finally, the amended appeal brief includes as part of the Evidence appendix copies of two Office Actions and the prior art reference the Examiner has used as a ground for rejection. Applicant believes these additions to be appropriate in view of 37 CFR 41.37(c)(1)(ix); that the Evidence appendix may include copies of the evidence relied upon by the Examiner as to grounds of rejection to be reviewed on appeal.

Respectfully submitted,

Dated: November 29, 2005


Ralph D. Chabot
Reg. No. 39,133



Attorney Docket No: 6536-0301

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES**

In re Application of: Chabot
Serial No: 10/707148 Art Unit: 3679
Filed: November 24, 2003 Examiner: Ernesto Garcia

For: Method for Limiting the Movement of an Infant in a Particular Direction

AMENDED APPEAL BRIEF

(1) Real party in interest

Renata Chabot.

(2) Related appeals and interferences

None.

(3) Status of Claims

Pending claims 2-10 have been rejected and have not been amended since the Office Action Made Final mailed 05/06/2005. Claim 1 has been canceled pursuant to a restriction requirement. Claims 2-10 are being appealed.

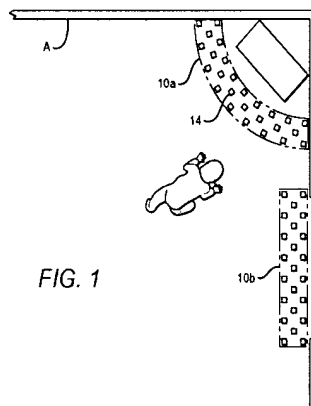
(4) Status of Amendments

The appellant filed an amendment submitting a replacement drawing sheet in response to Form PTO-948. The replacement drawing sheet was determined to be acceptable according to the "Advisory Action Before the Filing of an Appeal Brief" (PTOL-303) mailed 05/26/2005.

(5) Summary of claimed subject matter

Independent Claim 2

Claim 2 is a method for preventing movement of an infant from one area of a house to another by creating a barrier on a floor. Examples of the barrier are depicted in **Fig. 1** as **10a** or **10b** and described in the specification ¶ [0007, lines 1-8].¹ **Fig. 1** of the specification is presented below:



The method of claim 2 comprises providing a plurality of low-profile studs or upward extending sections. ¶ [0007, lines 1-8]. Each upward extending section has a top surface design that is incapable of puncturing the skin of an infant. ¶ [0005, lines 5-8]. The plurality of low-profile upward extending sections extend upward from the top surface of a sheeting material and the sheeting material is appropriately sized to substantially conform to the portion of the floor intended to be placed upon and thereafter the sheeting material is positioned upon the flooring ¶¶ [0006, lines 1-9] and [0030, lines 1-9] to create a barrier to prevent movement of the infant from one area of a house to another by providing the infant with temporary discomfort when the

¹ The preamble is considered by the Applicant to be a claim limitation.

infant touches and applies its own weight to both the top surface of the sheeting material and to at least one of the top surface designs. ¶¶ [0010, lines 1-6] and [0012, lines 1-9] and Fig. 1.

Independent Claim 5

Claim 5 is a method for preventing movement of an infant in a particular direction by creating a barrier on a floor. Examples of the barrier are depicted in Fig. 1 as 10a or 10b and described in the specification ¶ [0007, lines 1-8].²

The Claim 5 method comprises the providing of a sheeting material ¶ [0006, lines 1-6] and ¶ [0026, lines 4-7] having a plurality of upward extending low-profile sections. ¶ [0028, lines 1-5]. Each low profile section has a top surface design that is incapable of puncturing the skin of an infant. ¶¶ [0010, lines 1-6] and [0012, lines 1-9]. The design will provide temporary discomfort to the infant when the infant touches and applies its own weight to a portion of the sheeting material. ¶ [0030, lines 1-9]. The sheeting material is appropriately sized and positioned in a desired location upon a floor to create a barrier to prevent movement of an infant in a direction across the barrier. ¶¶ [0006, lines 1-6] and [0030, lines 1-6].

Independent Claim 6

Claim 6 is a method for preventing an infant from moving from one area of a house to another by creating a barrier upon a portion of a floor. ¶¶ [0007, lines 1-8] and [0017, lines 1-10]. Examples of the barrier are depicted in Fig. 1 as 10a or 10b and further described in the specification. ¶ [0026, lines 1-7].³

The Claim 6 method comprises providing a sheeting material having a low profile top surface design comprising a plurality of upward extending sections having respective distal ends. ¶¶ [0006, lines 1-6] and [0007, lines 1-5]. The low profile top surface design has a limited

² The preamble is considered by the Applicant to be a claim limitation.

height which permits older children and adults to step over. ¶ [0011, lines 4-5]. The distal ends are designed to provide temporary discomfort when an infant touches and applies its own weight to a portion of said sheeting material. ¶ [0030, lines 1-5]. The limited height of the barrier makes it difficult for an infant to grab and detach. ¶¶ [0005, lines 8-10] and [0011, lines 1-5].

The method further includes the sizing of the sheeting material for the portion of the floor to be placed upon, and the sheeting material is sized so that older children and adults can step over while providing a sufficient depth to discourage an infant from attempting to cross. ¶ [0016, lines 1-5]. The sized sheeting material is thereafter placed upon a floor in a substantially desired location to create a barrier preventing movement of an infant from one area of a house to another. ¶¶ [0006, lines 1-6] and [0030, lines 1-6].

(6) Grounds of rejection to be reviewed on appeal.

Issue #1. Claims 6, 9 and 10 stand rejected under 35 USC §112 second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter.

Issue #2. Claims 2-10 stand rejected under 35 USC §102 as being anticipated by U.S. Patent No. 4,431,166 issued February 14, 1984 to Marshall for an invention entitled “Garbage Can Mat”.

³ The preamble is considered by the Applicant to be a claim limitation.

(7) Argument

Issue #1. The 35 USC §112 second paragraph Rejection of Claims 6, 9 and 10.

A. The Examiner's Rationale

For claim 6, the examiner bases his rejection on the claim phrase “which permits older children and adults to step over” as being uncertain which children are considered older and which adults are capable of stepping over.⁴

The examiner noted:

“applicant has failed to provide any evidence to show that there is an existing ‘standard’ in the field of barrier mat manufacturing for sizing of mats to a person’s stepping gate. Therefore, any mat can be considered by applicant as having been ‘sized for older children and adults to step over’ while the manufacturer of the mat would believe otherwise. The same applies with regard to what constitutes an ‘older’ child. This being the case, whether the mat was covered by the claims or not would be determined not on the basis of structural elements and their interrelationships, but rather by means of a label placed on the mat at the discretion of the manufacturer. This gives rise to uncertainty in the interpretation of the claims. As a result of this uncertainty, the question of correspondence between a particular mat and this requirement of the claims cannot be determined until a particular user attempts to step over the mat. Therefore, the same mat might fall within the language when one particular older child or adult uses it but not when another older child or adult uses it. This is improper. See *Ex parte Brummer*, 12 USPQ2d 1654 (1989).”⁵ (Emphasis added).

B. Appellant's Argument

The examiner has attempted to fit the pending application within the four corners of the *Ex parte Brummer* holding since the passage above is taken directly from that case and replacing the subject matter at-issue in *Ex parte Brummer* with the term “mat”.

The examiner's attempt to analogize *Ex parte Brummer* to the pending application is respectfully incorrect. A closer review of that case is necessary to illuminate the differences.

Ex parte Brummer focused on a claim 9 which included the claim element: “a wheelbase that is between 58 percent and 75 percent of the height of the rider that the bicycle was designed for...”. (Emphasis added). The panel in *Ex parte Brummer* then discussed why rejection was

⁴ Page 2, May 6, 2005 Office Action, provided in Appendix B.

proper and based its decision on the uncertainty existing where a bicycle is considered by the appellant to fall within the scope of claim 9 while a manufacturer would not.

The facts here are markedly different. First and foremost, the claim is directed to a method for limiting the movement of an infant in a particular direction. The depth of the barrier is defined as that depth required to prevent an infant from attempting to cross while still allowing older children and adults to step across. **Specification ¶ [0016, lines 1-5]**. Rather than considering that the barrier limits movement of an infant, the examiner focused only on the stepping gate of adults and older children (analogized to the wheelbase in *Ex parte Brummer*).

In *Ex parte Brummer*, the panel rejected the pending claims because the claimed bicycle wheelbase could be used by different persons; with infringement occurring for some riders but not for others. Because the claims presented uncertainty as to when infringement would occur, the panel upheld the examiner's rejection. In the present matter, the barrier is designed to prevent infants from crossing which is definite and clear to one skilled in the art.

Even if this panel is tempted to agree with the examiner that *Ex parte Brummer* is applicable, a more recent Federal Circuit decision clarifies the situation and provides a solid basis for concluding the examiner misapplied *Ex parte Brummer*. In *Exxon Research and Engineering Co. v. United States*, 265 F.3d 1371; 60 USPQ 2d 1272 (Fed. Cir. 2001) the court held:

If the meaning of a claim is discernible and the conclusion may be one over which reasonable persons will disagree, the CAFC has held the claim sufficiently clear to avoid invalidity on indefiniteness grounds. The fact that claims "include species that might not meet the objects of the invention does not by itself prove that one skilled in the art cannot ascertain the scope of the asserted claims".

If the scope of the subject matter embraced by the claims is clear, and if applicants have not otherwise indicated that they intend the invention to be of a scope different from that defined in the claims, then the claims comply with 35 U.S.C. 112, second paragraph. MPEP §2173.04; *In re Ehrreich and Avery*, 590 F.2d 902; 200 USPQ 504, 508 (C.C.P.A. 1979).

Applicant's position is that the examiner failed to consider more relevant case law and MPEP §2173.04, electing instead to improperly reject claim 6 on a non-relevant basis.

⁵ Page 2, Advisory Action Before the Filing of an Appeal Brief (PTOL-303) mailed 05/26/2005.

With respect to the examiner's contention that claim 6 is indefinite because of uncertainty over which children are considered older, this is clearly identified in the specification as those children having developed the cognitive skill to jump over the barrier or be able to slide a flat surface over the barrier to act as a bridge for crossing. ¶ [0018, lines 2-6].

The examiner has also based his indefiniteness rejection on the health or disabilities associated with children and adults:

“Further, since children and adults have many physical characteristics, it would be uncertain whether all children, able or disabled, will infringe on the subject matter. The claim does not appear to cover all instances for all children and adults, especially the elderly, and therefore the claim would be uncertain.”⁶

The ability of the examiner to enumerate variations (i.e. healthy, disabled children, etc.) encompassed by the claim language points up the weakness of his indefiniteness argument. Breadth is not indefiniteness. *In re Robins*, 166 USPQ 552 (CCPA 1970); MPEP §2173.04.

During patent examination, the pending claims must be given the broadest reasonable interpretation consistent with the specification. MPEP §2173.05(a) citing *In re Morris*, 127 F.3d 1048, 1054; 44 USPQ 2d 1023, 1027 (Fed.Cir. 1997). “The PTO applies to verbiage of the proposed claims the broadest reasonable meaning of the words in their ordinary usage as they would be understood by one of ordinary skill in the art, taking into account whatever enlightenment by way of definitions or otherwise that may be afforded by the written description contained in applicant's specification.” MPEP §2111.

If the claims, read in light of the specification, reasonably apprise those skilled in the art both of the utilization and scope of the invention, and if the language is as precise as the subject matter permits, the statute (35 U.S.C. 112, second paragraph) demands no more. MPEP §2173.05(a) citing *Shatterproof Glass Corp. v. Libbey Owens Ford Co.*, 758 F2d. 613; 225 USPQ 634 (Fed. Cir. 1985).

This is precisely the situation pending before this panel. One skilled in the art is apprised of the scope of the invention upon reading both the specification and claim 6.

⁶ Page 2, Office Action mailed 05/06/2005.

In view of the holdings of *Exxon Research, In re Robins*, and *In re Ehrreich and Avery*, infra, and the argument presented, it is respectfully requested that the rejection of claims 6, 9 and 10 under 35 USC 112, second paragraph should not be sustained.

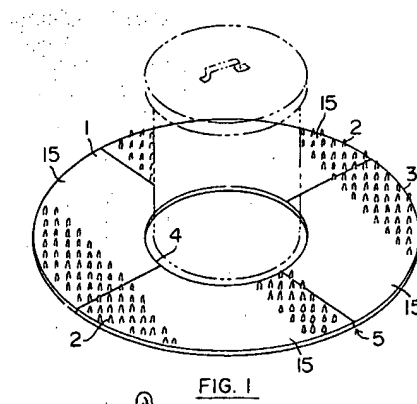
Issue#2. *The 35 USC §102 Rejection of Claims 2-10 on the Marshall prior art.*⁷

A. The Examiner's Rationale

In rejecting claims 2-5, the examiner held that Marshall discloses in Fig. 1 and Fig. 9, a method comprising the steps of:

providing low-profile upward extending sections 2;
appropriately sizing the length and the depth of a sheeting material 6 to substantially conform to a floor (see sizes of Figures 1 and 9); and,
positioning the sheeting material across a portion of the floor.

The following illustration is Fig. 1 of the Marshall reference:



The examiner summarizes the basis for his 102 rejection of claims 2-10:

“...it is well-established that the patentability of method claims is based on the recited method steps and not recited structure unless such structure is affected in the manipulative sense by the method steps. Applicant states he is unaware of any provision in the MPEP or case law to support this position. It is not clear what point applicant is seeking to make with this statement since an applicant’s awareness of proper procedure and policy is not the standard for determining patentability. Nevertheless, applicant’s attention is directed to *Ex parte Pfeiffer*, 135 USPQ 31, 1962 C.D. 408 (1961).”⁸

⁷ The Marshall reference, U.S. Pat. No. 4,431,166 is provided in Appendix B.

⁸ Pages 2-3, Advisory Action Before the Filing of an Appeal Brief (PTOL-303) mailed 05/26/2005, provided in Appendix B.

B. Appellant's Argument

Stated simply, the Marshall reference does not teach, nor suggest, appellant's method for using a barrier to limit movement of an infant. It is improper to base an anticipation rejection on 35 USC §102 using a reference that does not teach nor suggest appellant's novel method of limiting the movement of an infant in a particular direction.

When I queried the examiner with respect to my unawareness of any provision in the MPEP or case law to support his position, I did so to elicit the legal grounds supporting his position for preparing my argument to this panel. Prior to providing the *Ex parte Pfeiffer* reference, the examiner had consistently relied upon his interpretation of 35 USC 102 without support.

I continue to be unaware of any provisions in the MPEP or case law that support the examiner's position. *Ex parte Pfeiffer* is not relevant; its holding having been taken out of context. More importantly, the examiner has not relied upon a single applicable section of the MPEP to support his position. For the reasons that follow, the holding of *Ex Parte Pfeiffer* has been misapplied by the examiner to improperly reject claims 2-10.

1. Misapplication of *Ex parte Pfeiffer*

The panel in *Ex parte Pfeiffer* determined that the relied-upon references taught the same method concept as the pending claims on appeal; specifically, the transfer of fluid material from an aeroplane to the ground by freely dropping a bag containing such material from the aeroplane without the necessity of a parachute. This is markedly different than the application pending on appeal where the same method is not taught nor suggested by the Marshall reference.

In *Ex parte Pfeiffer*, applicant's differences in the height from which the bags were released was ruled not to alter the method; nor was applicant's claimed use of rubber as the composite bag material. To summarize, the reason the board rejected the appeal in *Ex Parte Pfeiffer* was because the applicant was attempting to claim the same identical method; varying only the bag release height and its composition.

By contrast, the methods of use are clearly distinguishable between the pending claims and the Marshall reference. The examiner's prior-art reference is directed to a trash can mat that

is located about the perimeter of a garbage can. The mat has to be sufficiently wide to carry out its intended purpose; that being to prevent a large dog from standing on its hind legs and then use its weight to knock over the garbage can. (Marshall ref. Col 1, lines 6-8). As described in the specification, the mat comprises a plurality of spikes that are of sufficient length to penetrate past the paw pads of a large dog and inflict pain to the adjacent soft tissue. (Marshall ref. Col 3, lines 49-59). The mat is designed to be stood upon so an adult may deposit trash into the container. (Marshall ref. Col 4, lines 10-15).

The Marshall reference implicitly defines the range for the depth of the mat to be that which would deter a large dog from knocking over a trash can and that range must also be sufficiently wide so that an adult must step upon the mat in order to get close enough to remove the trash can cover and deposit trash into the can. The Marshall reference also requires that the invention have mat ring modules which are snap-fastened together to form an enclosing barrier for a garbage can (Marshall ref. Col 1, lines 39-41); something the pending application does not.

To find anticipation of claims, the prior-art embodiments must possess the properties expressly recited in the claims. Property limitations can serve to distinguish claimed subject matter from other products. *E.I. du Pont de Nemours & Co. v. Phillips Petroleum Co.*, 849 F.2d 1430, 7 USPQ2d 1129 (Fed. Cir. 1988).

The depth of the barrier in the claimed invention can not be the same and must be less than the depth of Marshall's garbage can mat. The barrier depth is sized to deter an infant from attempting to cross while permitting adults and older children to cross. The Marshall reference does not teach nor suggest crossing the mat; rather, it requires standing upon the mat.

If Marshall's garbage can mat were sized according to applicant's method of using a barrier, i.e. to allow for adults and older children to cross, the intended purpose of Marshall would be defeated. In other words, if Marshall's mat were appropriately sized so older children and adults could step across, so too could a large dog position its hind legs behind the barrier and still be able to place its front paws upon the garbage can to knock over.

To summarize the differences, the Marshall reference describes a garbage can mat to prevent large dogs from knocking over the garbage can surrounded by a mat while the pending

application presents claims directed to a method to limit the movement of an infant in a particular direction.

Applicant submits the purposes of the prior art reference and pending claims are clearly distinguishable to the extent there can be no valid rejection on the basis of anticipation. Anticipation requires identity of invention. The claimed invention, as described in pending claims 2-10, must be the same as that of the reference in order to anticipate. *Glaverbel Societe Anonyme v. Northlake Marketing & Supply Inc.*, 45 F.3d 1550, 33 USPQ2d 1496, 1498 (Fed. Cir. 1995).

The examiner ignores the purpose of the prior art, electing instead to rely on selected claim elements to establish his ground for rejection. When a claimed invention is not identically disclosed in a reference, and instead requires picking and choosing among a number of different options disclosed by the reference, then the reference does not anticipate. *Mendenhall v. Astec Industries, Inc.*, 13 USPQ2d 1913, 1928 (Tenn. 1988), *aff'd*, 13 USPQ2d 1956 (Fed. Cir. 1989).

2. Preamble as a claim limitation

In determining whether anticipation exists, this panel should also consider the preamble of the pending claims contrasted to the Marshall reference. Applicant believes the preamble for each of the pending claims should be treated as a limitation of the claims.

While no litmus test defines when a preamble limits claim scope *Corning Glass Works v. Sumitomo Elec. U.S.A., Inc.*, 868 F.2d 1251, 1257; 9 USPQ2d 1962, 1966 (Fed. Cir. 1989), whether to treat a preamble as a limitation is a determination “resolved only on review of the entirety of the patent to gain an understanding of what the inventors actually invented and intended to encompass by the claim. *Catalina Mktg. Int’l v. Coolsavings.com, Inc.* 289 F.3d 801, 808; 62 USPQ2d 1781, 1785 (Fed. Cir. 2002).

Clear reliance on the preamble during prosecution to distinguish the claimed invention from the prior art may indicate that the preamble is a claim limitation because the preamble is used to define the claimed invention. *Catalina Mktg.*, 289 F.3d at 808; 62 USPQ2d at 1785; *Bristol-Myers Squibb Co., v. Ben Venue Labs.*, 246 F.3d 1368, 1375; 58 USPQ2d 1508, 1513

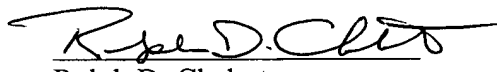
(Fed. Cir. 2001). So is the case for the pending application. The preamble is relied upon by the Applicant to distinguish the claimed invention from the prior art reference.

In Marshall, both independent claims use the following preamble: "A garbage can mat comprising...".⁹ Representative of Applicant's pending claims is claim 2 where the preamble reads: "A method for preventing movement of an infant from one area of a house to another by creating a barrier on a floor comprising the steps of". The preamble for each pending claim is distinguishable from the Marshall reference and its claims. Applicant relies on her preambles to distinguish her claimed invention from the prior art. Because the preamble for each of the pending claims should be construed as a claim limitation, the examiner's rejection on the basis of anticipation is improper.

For the foregoing reasons, it is submitted the examiner's rejections of claims 2-10 were erroneous, and reversal of his decision is respectfully requested.

Respectfully submitted,

Dated: November 29, 2005


Ralph D. Chabot
Reg. No. 39,133

⁹ Claims 1 and 2 of U.S. Pat. No. 4,431,166.

(8)

APPENDIX A
Claims Appendix

Claim 2. A method for preventing movement of an infant from one area of a house to another by creating a barrier on a floor comprising the steps of:

providing a plurality of low-profile upward extending sections, each upward extending section having a top surface design that is incapable of puncturing the skin of an infant, said plurality of low-profile upward extending sections extend upward from the top surface of a sheeting material;

appropriately sizing the length and depth of the sheeting material to substantially conform to the portion of the floor intended to be placed upon; and,

positioning said sheeting material across said portion of the floor to create a barrier to prevent movement of the infant from one area of a house to another by providing the infant with temporary discomfort when the infant touches and applies its own weight to both the top surface of said sheeting material and to at least one of said top surface designs.

Claim 3. The method of claim 2 where said sheeting is adhesively attached to the flooring.

Claim 4. The method of claim 2 where said sheeting is attached to the flooring using hook and loop.

Claim 5. A method for preventing movement of an infant in a particular direction by creating a barrier on a floor comprising the steps of:

providing a sheeting material, said sheeting material having a plurality of upward extending low profile sections, each low profile section having a top surface design that is incapable of puncturing the skin of an infant yet will provide temporary discomfort to the infant when the infant touches and applies its own weight to a portion of the sheeting material;

appropriately sizing the sheeting material; and,

positioning said appropriately sized sheeting material in a desired location upon a floor to create a barrier to prevent movement of an infant in a direction across the barrier.

Claim 6. A method for preventing an infant from moving from one area of a house to another by creating a barrier upon a portion of a floor comprising the steps of:

providing a sheeting material having a low profile top surface design, said low profile top surface design comprising a plurality of upward extending sections having respective distal ends, said low profile top surface design having a limited height which permits older children and adults to step over and said distal ends designed to provide temporary discomfort when the infant touches and applies its own weight to a portion of said sheeting material; said limited height further defined as being sufficiently short so that an infant would not be able to grab and detach any of said upward extending sections;

sizing said sheeting material for the portion of said floor upon which said sheeting material is to be placed, said sheeting material sized for older children and adults to step over while still providing sufficient depth to discourage an infant from attempting to cross; and,

placing said sheeting material upon a floor in a substantially desired location to create a barrier preventing movement of an infant from one area of a house to another.

Claim 7. The method of claim 5 where said sheeting is adhesively attached to the flooring.

Claim 8. The method of claim 5 where said sheeting is attached to the flooring using hook and loop.

Claim 9. The method of claim 6 where said sheeting is adhesively attached to the flooring.

Claim 10. The method of claim 6 where said sheeting is attached to the flooring using hook and loop.

(9)

APPENDIX B
Evidence Appendix

1. Office Action mailed 05/06/2005
2. Advisory Action Before the Filing of an Appeal Brief (PTOL-303) mailed 05/26/2005
3. U.S. Pat. No. 4,431,166

APPENDIX B
Evidence Appendix

1. Office Action mailed 05/06/2005



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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/707,148	11/24/2003	Renata Chabot	6536-0301	1147
24936	7590	05/06/2005	EXAMINER	
RALPH D CHABOT 2310 E PONDEROSA DR SUITE 4 CAMARILLO, CA 93010			GARCIA, ERNESTO	
			ART UNIT	PAPER NUMBER
			3679	

DATE MAILED: 05/06/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No.	Applicant(s)	
	10/707,148	CHABOT, RENATA	
	Examiner	Art Unit	
	Ernesto Garcia	3679	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 07 April 2005.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 2-10 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 2-10 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|-------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input checked="" type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Claim Rejections - 35 USC § 112

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 6, 9, and 10 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Regarding claim 6, the metes and bounds of the claim is uncertain. In particular, the limitation "which permits older children and adults to step over" as it is uncertain which children are considered older and which adults are capable of stepping over. Further, since children and adults have many physical characteristics, it would be uncertain whether all children, able or disabled, will infringe on the subject matter. The claim does not appear to cover all instances for all children and adults, especially the elderly, and therefore the claim would be uncertain.

Regarding claims 9 and 10, the claims depend from claim 6 and therefore are indefinite.

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 2-10 are rejected under 35 U.S.C. 102(b) as being anticipated by Marshall, 4,431,166.

Regarding claim 2, Marshall discloses, in Figure 1 and 9, a method comprising steps of:

providing low-profile upward extending sections 2;

appropriately sizing the length and the depth of a sheeting material 6 to substantially conform to a floor (see sizes of Figures 1 and 9); and,

positioning the sheeting material across a portion of the floor. Applicant is reminded that the steps prevent movement of an infant from one area of a house to another and create a barrier to prevent movement of the infant from one area of a house to another by providing the infant with temporary discomfort when the infant touches and applies its own weight to both the top surface of the sheeting material and to at least one of said extending sections. Further, applicant is reminded that in method claims, it is the patentability of the method steps that is to be determined and not the recited structure. Structure not affected in the manipulation sense is given no

patentable weight. Therefore, the low-profile upward extending sections extend upward from the top surface of the sheeting material.

Regarding claims 3, 4 and 7-10, at the outset, it should be noted that in method claims, it is the patentability of the method steps that is to be determined and not the recited structure. Structure not affected in the manipulation sense is given no patentable weight.

Regarding claim 5, Marshall discloses, in Figures 1 and 9, a method comprising steps of:

providing a sheeting material 6;

appropriately sizing the sheeting material 6; and

positioning the sheeting material 6, appropriately sized, in a desired location upon a floor.

Applicant is reminded that that in method claims, it is the patentability of the method steps that is to be determined and not the recited structure. Structure not affected in the manipulation sense is given no patentable weight. Furthermore, applicant is reminded that the sheeting material creates a barrier to prevent further movement of an infant in a particular direction. The step of positioning creates a barrier to prevent movement of an infant in a direction across a barrier. The sheeting material has upward extending low profile sections having a top surface design incapable of

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puncturing the skin of an infant yet will provide temporary discomfort to the infant when the infant touches and applies its own weight to a portion of the sheeting material.

Regarding claim 6, Marshall discloses, in Figures 1 and 9, a method comprising steps of:

providing a sheeting material;

sizing the sheeting material; and,

placing the sheeting material upon a floor in a substantially desired location.

Applicant is reminded that that in method claims, it is the patentability of the method steps that is to be determined and not the recited structure. Structure not affected in the manipulation sense is given no patentable weight. Applicant is reminded that the sheeting material creates a barrier preventing movement of an infant from one area of a house to another. The sheeting material is sized for older children and adults to step over while still provide sufficient depth to discourage an infant from attempting to cross. Further, the sheeting material has upward extending low profile sections having a top surface design incapable of puncturing the skin of an infant yet will provide temporary discomfort to the infant when the infant touches and applies its own weight to a portion of the sheeting material.

Response to Arguments

Applicant's arguments filed April 7, 2005 have been fully considered but they are not persuasive.

Applicant's arguments fail to comply with 37 CFR 1.111(b) because they amount to a general allegation that the claims define a patentable invention without specifically pointing out how the language of the claims patentably distinguishes them from the references. In particular, applicant has not set forth what step Marshall fails to teach. Applicant has made spurious arguments by indicating that Marshall discloses a garbage can mat or that the garbage can mat is not disclosed as a method for preventing movement of an infant from one area of a house to another by creating a barrier on a floor. In response, it is not the preamble that defines the claims but rather the steps in the body of the method claims.

The applicant has also noted that a large dog would not be deterred by Applicant's low profile barrier. In response, it is not the applicant's low profile barrier that is in question, but rather the capabilities of Marshall's profile barrier. Further, applicant has indicated that the instant invention can as well be used in small domesticated dogs. Therefore, Marshall equally qualifies as prior art.

Applicant has placed emphasis on the limitation "said sheeting material sized for older children and adults to step over while still providing sufficient depth to discourage an infant from attempting to cross" to compare the mat in Marshall from being designed to step upon. In response, this limitation is a structural limitation and has no manipulability sense in the method claim. This argument will be more effective in structure claims, but not in method claims. In any event, the term "step over" is very broad and also can imply stepping on the mat as placing a foot over the mat. Further, despite Marshall teaches the mat designed to step upon, Marshall does not state that a person cannot jump or step over the mat. One of skill would find that any older child, which can be a teenager, can jump over or step over the mat. Moreover, applicant should note that children come in many sizes that even supersede an adult.

In conclusion, in assessing Marshall, skill is presumed on part of the artisan or the user, rather than the lack thereof. In re Sovish, 769 F.2d 738, 226 USPQ 771, 774 (Fed. Cir. 1985). Insofar as Marshall is concerned, the examiner is bound to consider Marshall's disclosure for what steps fairly teaches one of ordinary skill in the art, including inferences which one of ordinary skill in the art would reasonably have been expected to drawn therefrom. See In re Boe, 355 F.2d 961, 965, 148 USPQ 507, 510 (ccpa 1966) and In re Preda, 401 F.2d 825,826,159 USPQ 342, 344 (CCPA 1968).

Having reviewed Marshall, it is inconceivable to the examiner that a person of ordinary skill in the art would have failed to appreciate the steps disclosed in Marshall to

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provide a barrier to any living entity accessing the trash can either inside or outside the house as such a barrier would prevent an infant from moving from one area of the house to another as behind the trash can. Further, to conclude that such a person would not have recognized the benefits of providing the steps used in Marshall would be to improperly assume that the artisan or the user possesses less than ordinary skill. Since children and dogs come in different sizes, it would not be proper to assume that the spikes cannot be less than 1.5 inches.

Conclusion

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

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Any inquiry concerning this communication or earlier communications from the examiner should be directed to Ernesto Garcia whose telephone number is 571-272-7083. The examiner can normally be reached from 9:30-5:30. The fax phone numbers for the organization where this application or proceeding is assigned are 703-872-9326 for regular communications and 703-872-9327 for After Final communications.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Daniel P. Stodola can be reached on 571-272- 7087. Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is 703-308-1113.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

E.G.

E.G.

May 2, 2005

Daniel P. Stodola

DANIEL P. STODOLA
SUPERVISORY PATENT EXAMINER
TECHNOLOGY CENTER 3600

APPENDIX B
Evidence Appendix

2. Advisory Action Before the Filing of an Appeal Brief (PTOL-303) mailed 05/26/2005



UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE
United States Patent and Trademark Office
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www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/707,148	11/24/2003	Renata Chabot	6536-0301	1147
24936	7590	05/26/2005	EXAMINER	
RALPH D CHABOT 2310 E PONDEROSA DR SUITE 4 CAMARILLO, CA 93010			GARCIA, ERNESTO	
			ART UNIT	PAPER NUMBER
			3679	

DATE MAILED: 05/26/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

**Advisory Action
Before the Filing of an Appeal Brief**

Application No.

10/707,148

Applicant(s)

CHABOT, RENATA

Examiner

Ernesto Garcia

Art Unit

3679

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 5/11/05 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☐ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☐ The period for reply expires _____ months from the mailing date of the final rejection.
b) ☒ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. If no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.

Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on _____. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
(a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);
(b) ☐ They raise the issue of new matter (see NOTE below);
(c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
(d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: _____. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
5. ☐ Applicant's reply has overcome the following rejection(s): _____.
6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
7. ☐ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.
The status of the claim(s) is (or will be) as follows:
Claim(s) allowed: _____.
Claim(s) objected to: _____.
Claim(s) rejected: _____.
Claim(s) withdrawn from consideration: _____.

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing a good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because: see attachment.
12. ☐ Note the attached Information Disclosure Statement(s). (PTO/SB/08 or PTO-1449) Paper No(s). _____.
13. ☒ Other: The drawings filed on 5/11/05 are acceptable.

A. With respect to applicant's remarks concerning the section 112 rejection of claims 6, 9 and 10, it is noted that applicant has failed to provide any evidence to show that there is an existing known "standard" in the field of barrier mat manufacturing for sizing of mats to a person's stepping gate. Therefore, any mat can be considered by applicant as having been "sized for older children and adults to step over" while the manufacturer of the mat would believe otherwise. The same applies with regard to what constitutes an "older" child. This being the case, whether the mat was covered by the claims or not would be determined not on the basis of structural elements and their interrelationships, but rather by means of a label placed on the mat at the discretion of the manufacturer. This gives rise to uncertainty in the interpretation of the claims. As a result of this uncertainty, the question of correspondence between a particular mat and this requirement of the claims cannot be determined until a particular user attempts to step over the mat. Therefore, the same mat might fall within the language when one particular older child or adult uses it but not when another older child or adult uses it. This is improper. See Ex parte Brummer, 12 USPQ 2d 1654.

DPS B. With respect to applicant's remarks regarding the section 102 rejection, it is well-established that the patentability of method claims ^{is} ~~are~~ based on the recited method steps and not recited structure unless such structure is affected in the manipulative sense by the method steps. Applicant states that he ^{is} ~~is~~ unaware of any provision in the MPEP or case law to support this position. It is not clear what point applicant is seeking to make with this statement since an applicant's "awareness" of proper procedure and

DPS

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policy is not the standard for determining patentability. Nevertheless, applicant's attention is directed to Ex parte Pfeiffer, 135 USPQ 31, 1962 C.D. 408 (1961).

C. The rejections remain proper for the reasons previously advanced.

Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Ernesto Garcia whose telephone number is 571-272-7083. The examiner can normally be reached from 9:30-5:30. The fax phone numbers for the organization where this application or proceeding is assigned are 703-872-9326 for regular communications and 703-872-9327 for After Final communications.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Daniel P. Stodola can be reached at 571-272-7087.

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you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

E.I.

E.G.

May 23, 2005

Daniel P Stodola

DANIEL P. STODOLA
SUPERVISORY PATENT EXAMINER
TECHNOLOGY CENTER 3600



REPLACEMENT SHEET

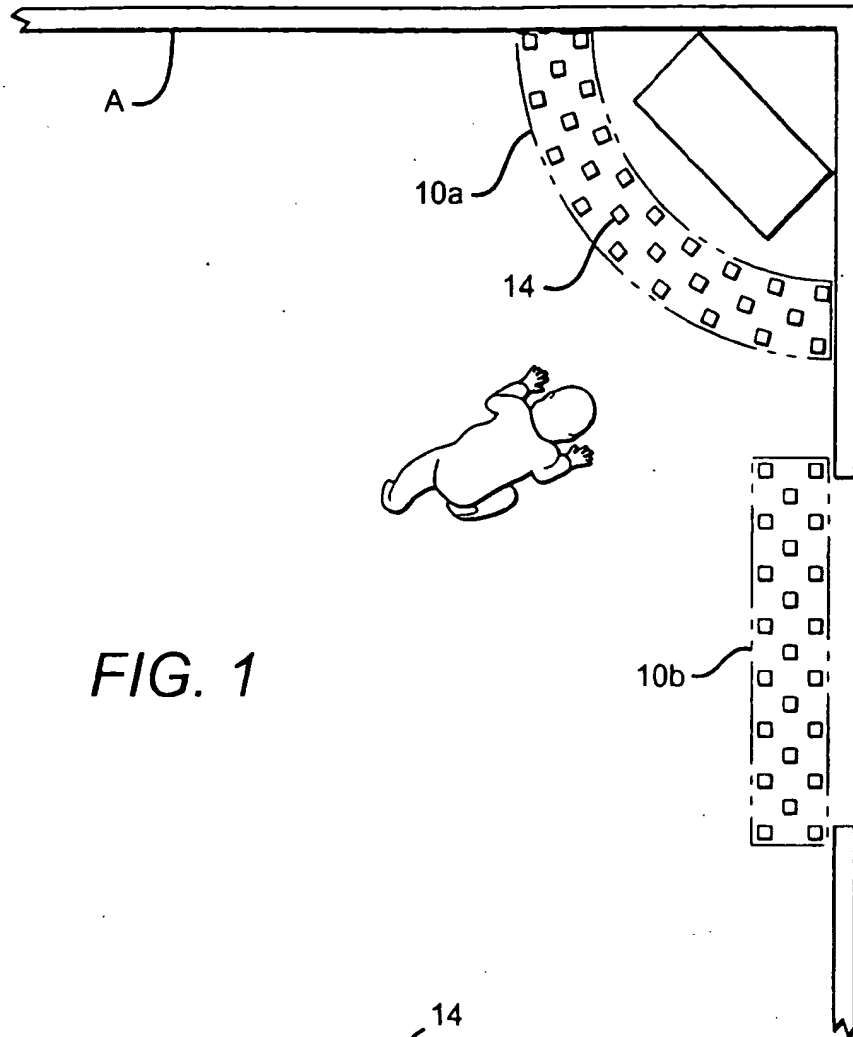


FIG. 1

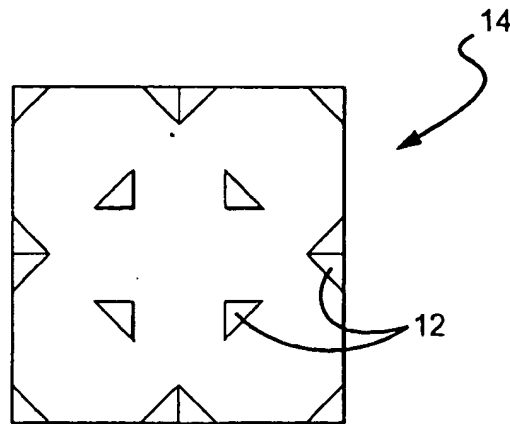


FIG. 2

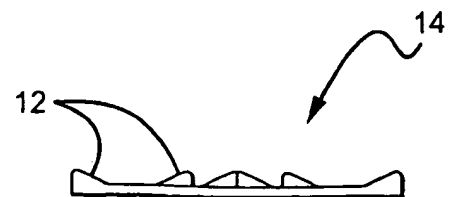


FIG. 3

Accepted
E.L.
5/18/05

APPENDIX B
Evidence Appendix

3. U.S. Pat. No. 4,431,166

(10)

APPENDIX C
Related Proceedings Appendix

None.